

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

76-1483

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 76-1483

UNITED STATES OF AMERICA,

—v.—

EDMUND A. ROSNER,

Appellant.

APPELLANT'S REPLY BRIEF

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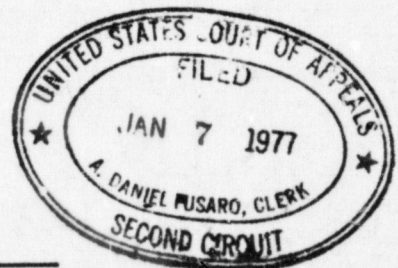


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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA

-v-

EDMUND A. ROSNER,

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APPELLANT'S REPLY BRIEF

POINT

THE SENTENCE IMPOSED UPON APPELLANT
WAS ILLEGAL BECAUSE IN IMPOSING
SENTENCE, JUDGE WYATT CONSIDERED
JUDGE BAUMAN'S PRIOR ILLEGAL SENTENCE.

JUDGE WYATT DID CONSIDER THE PRIOR ILLEGAL SENTENCE.

The Government contends that Judge Wyatt's remarks prior to imposing sentence on Rosner on August 16, 1974 did not evidence Judge Wyatt's consideration of Judge Bauman's prior illegal sentence (Gov't's Brief pp.5,7). This argument is based either upon a distortion or a misreading of the record.

Judge Wyatt stated at the time of sentence:

I believe that Judge Bauman's sentence is one of the many factors to be considered, properly to be considered by me, in arriving independently at a sentence now to be imposed. (A 26-27).

In addition, on October 1, 1976 at the hearing on Rosner's motion to vacate his sentence, when Rosner's counsel stated to Judge Wyatt that his consideration of Judge Bauman's illegal sentence, because of the professional respect that he had for Judge Bauman, was error, Judge Wyatt interjected that he gave weight to Judge Bauman's sentence because Judge Bauman had tried the case (A 45). When the Government's counsel stated to Judge Wyatt "...it is clear from the sentencing minutes that all your Honor was considering was Judge Bauman's view that this was a serious crime..." Judge Wyatt did not adopt the Government's version of the facts (A 47-48).

Based upon its conclusion that Judge Wyatt did not consider the prior sentence, the Government then argues and cites authorities for the proposition that Rosner cannot attack what Judge Wyatt did not consider (Govt's Brief p.6). We do not dispute these holdings. However, the entire line of argument is irrelevant, since Rosner is only attacking Judge Wyatt's sentence on the basis of what he specifically stated he was considering (i.e. Judge Bauman's prior illegal sentence).

JUDGE WYATT'S SENTENCE RELIED UPON IMPROPER CRITERIA.

The Government's brief states Rosner's position as being analogous to situations where the sentencing judge relied upon misinformation in imposing sentence (Govt's Brief p.3). This statement contains only half of Rosner's position. The half which is not referred to is that Judge Bauman's prior illegal sentence was an improper criterion, as distinguished from any claim of misinformation, upon which to impose, even in part, the re-sentence.

In United States v. Seijo, 537 F.2d 694 (2d Cir. 1976), this Court stated that a sentence was illegal if it was predicated upon either "improper criteria or materially incorrect information" 537 F.2d at 699. Accord, United States v. Brown, 479 F.2d 1170, 1172 (2d Cir. 1973). Here, Judge Bauman's sentence was an improper criterion and Judge Wyatt's sentence was fatally infected by the reliance upon it.

The principle seems settled that a sentence is illegal where it is influenced in its formulation by a prior illegal sentence. United States v. Tucker, 404 U.S. 443 (1972); McGee v. United States, 462 F.2d 243 (2d Cir. 1972). The fact that Tucker and McGee involved illegal convictions which may have influenced the defendant's sentence rather than a prior illegal sentence is a distinction without a difference, and the Government makes no argument to the contrary. There is no

requirement that the illegality be based upon misinformation before the sentence is rendered invalid.

The sentence imposed by Judge Bauman was held illegal because Rosner was not afforded an opportunity to refute the factual allegations contained in the government's sentencing memorandum. The five year sentence was formulated upon an unrefuted set of allegations. To what degree the allegations made by the government influenced Judge Bauman can only be guessed at.* But it is certain, that the decision to impose a five year sentence was substantially based upon information supplied by the government. Where the outer perimeter of a sentence is set upon considerations not properly before the Court, that perimeter is an entirely unreliable base upon which to predicate a sentence. What seems to have occurred here, is that Judge Wyatt, by considering the prior illegal sentence, relied upon it to act as a guide post for the supposedly de novo resentencing. Judge Wyatt apparently deducted from Rosner's five year sentence, a time period which he felt was commensurate with Rosner's repudiation of some or all of the government's similar allegations

*This reasoning applies with even greater force where, as here, the government's sentencing memoranda contained different allegations. Evidently, some of the allegations made to Judge Bauman were not made to Judge Wyatt. Thus, factors which Rosner did not have the opportunity to rebut, still had a direct effect upon resentencing because of Judge Wyatt's consideration of the prior sentence. Moreover, the difference in the allegations before the two sentencing judges makes it impossible to quantify the effect of those allegations on the original sentence.

made at resentence. This procedure gave impermissible effect to Judge Bauman's sentence. In fact, rather than a de novo sentence, Rosner really received a modification of the original sentence. This procedure is not what is meant by a de novo sentence. See, McGee v. United States, 462 F.2d 243,247 n.8 (2d Cir. 1972).

ROSNER CANNOT BE FAULTED FOR NOT RESPONDING TO A SENTENCING MEMORANDUM WHICH THE GOVERNMENT WITHDREW FROM THE COURT'S CONSIDERATION.

Apparently the Government contends that if Rosner thought Judge Wyatt was influenced by the Government's original presentence memorandum, he had a year to respond to it (Govt's Brief pp.6-7). This contention is unrealistic and distorts the facts. The Government did not resubmit the original memorandum but rather, substituted another in the sentencing proceedings before Judge Wyatt to which Rosner responded. Rosner could not be expected to respond to a memorandum which he understood was not then before the Court. We contend, however, that since Judge Bauman was influenced by misinformation, Judge Wyatt was similarly influenced by such misinformation, even if unwittingly, since he considered Judge Bauman's sentence in formulating the sentence he imposed.

CONCLUSION

JUDGE WYATT'S SENTENCE SHOULD BE VACATED AND
THE CASE REASSIGNED FOR RESENTENCING DE NOVO BEFORE ANOTHER
JUDGE.

Respectfully submitted,

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